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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 886

WILLIAM C. BARNES,
Petitioner

v.

REDERI A/B FREDRIKA, Defendant and Third-Party Plaintiff, and ATLANTIC & GULF STEVEDORES, INC., Third-Party Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, William C. Barnes respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled matter on September 9, 1965.

OPINIONS OF THE COURTS BELOW

No opinion was filed by the District Court for the Eastern District of Virginia. The opinion of the Court of Appeals for The Fourth Circuit is reported at 350 F. 2d 865 (infra. pp. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1965 (infra, pp. 7a). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1245 (1).

QUESTION PRESENTED

Where a longshoreman is a member of a gang that is in the process of loading and discharging cargo does the shipowner owe him an absolute duty to provide a seaworthy vessel?

STATEMENT OF THE CASE

On March 22, 1963, the date that William Barnes was injured he was employed by the Stevedore in the capacity of a longshoreman for the purpose of assisting with cargo handling operations aboard the S.S. DOROTEA. Barnes went on board the vessel at approximately 1:00 P.M., on the date of his injury and subsequently proceeded to discharge cargo from number four hatch. At this time he was working on the off-shore side of the vessel. After the work had been completed in number four hold it was discovered that some cargo which had not been designated for the port of Norfolk, Virginia, had been unloaded by mistake. The longshoremen, including Barnes were ordered to

go back into the number four hold in the 'tween deck area where bales of wool would be reloaded. Barnes climbed down the ladder and while proceeding to his general working area he fell into the number five lower hold from the 'tween deck level. In proceeding to his working area he walked around some cargo that was stowed between the number four and number five holds. The distance from the opening of the number four hold to the opening of the number five hold was approximately nineteen feet.

The area around the number five hold was dark since the hold was closed on the main deck level and all hatch boards secured on that deck. Although there were bulkheads between the number four and number three holds, there was no bulkhead between the number four and number five holds. At least two hatch boards from the number five 'tween deck area where Barnes fell had previously been removed without any warning or notification to the Stevedore, the hatch boss or Barnes.

Suit was brought by Barnes and in that action the Court submitted the case to the jury solely on the issue of unseaworthiness, the negligence count of the complaint having been withdrawn on the day of trial. The trial court in its charge to the jury in part stated that if the longshoreman was in a part of the ship where he had no right to be and where the shipowner could not reasonably anticipate or expect him to be then the warranty of seaworthiness would not extend to him.

The jury rendered a verdict for the Shipowner.

The Court of Appeals in a unanimous decision

affirmed saying that confining the duty of maintaining a seaworthy vessel to the reasonable scope of the longshoreman's activity is logical and correct in principle. Fully acknowledged as an obligee of the ship's duty, nevertheless the longshoreman's due should not exceed the need for his protection as measured by his function on the vessel. The Court said further that he is not subject to momentary orders, as is a crewman, to any part of the vessel whatsoever, and his presence at a location unconnected with his task is not to be anticipated.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The decision below that a ship owner is Not Liable for Injuries Sustained by a Longshoreman if he is in a Place on the Vessel Where he Could not be Reasonably Expected to Go is in Conflict With the Ruling of This Court in *Seas Shipping Company* v. *Sieracki,* 328 U.S. 85 holding, without any Limitation, that Liability for Unseaworthiness was Extended to Longshoremen.

The crucial issue is whether or not a ship owner is liable for the unseaworthiness of a vessel and for the injuries sustained by a longshoreman only when he is where he might reasonably be expected to be, which to this writer connotes a co-mingling of negligence and unseaworthiness theories, or whether the ship-owner has an absolute duty to furnish the longshoreman with a seaworthy vessel. It is respectfully submitted that when this Honorable Court extended the doctrine of unseaworthiness to include and benefit longshoremen in *Seas Shipping Co., Inc.,* v. *Sieracki,* 328 U.S. 85, 66 S.Ct. 872 that no mention was made, or inferences

raised that this doctrine of unseaworthiness, which places an absolute duty on the shipowner, was to be whittled down and severely restricted *even after* the maritime worker came aboard the vessel for the benefit of the ship-owner. It is of course recognized that the ship-owner is not an insurer of the safety of the longshoreman, nor do we ask that he be an insurer, but, what we do ask is that once the sanctuary of a seaworthy vessel is extended to the longshoreman that what was once an absolute duty be not diluted by theories of negligence. The only circuit to take away from the longshoremen what was given to them in the *Sieracki* case is the second circuit in *Calderola* v. *Cunard S.S. Co.* 279 F.2d. 475 (2 Cir. 1960) cert. den. 364 U.S. 884 which this writer respectfully submits was erroneously founded on the eariler second circuit case of *Lauricella* v. *United States,* 185 F.2d 327 (2 Cir. 1950) which was a negligence case. This matter is one of utmost importance to a longshoreman who is on the vessel by the shpiowner's invitation and with his permission, for if this case is allowed to stand who is to say how far a longshoreman can go to smoke a cigarette or where he might go to seek out a bathroom.

CONCLUSION

The present decision rocks the very foundation established in the *Sieracki* case of the absolute duty of a shipowner to furnish a longshoreman with a seaworthy vessel. No longer can a longshoreman who comes aboard a shipowner's vessel by invitation and with his permission be certain that the absolute duty placed on the shipowner will extend to him once a factual question is allowed to be raised.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
CALVIN W. BREIT,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9939.

William C. Barnes, Plaintiff,
Appellant,

versus

Rederi A/B Fredrika, Defendant and Third-Party Plaintiff, and Atlantic & Gulf Stevedores, Inc., Third-Party Defendant,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued July 1, 1965. Decided September 9, 1965.)

Before HAYNESWORTH, Chief Judge, and BRYAN and BELL, Circuit Judges.

C. Arthur Rutter, Jr., (Gerald Rubinger and Amato, Babalas, Breit, Cohen, Rutter & Friedman on brief) for Appellant, and Charles R. Dalton, Jr., (Peter W. Rowe and Seawell, McCoy, Winston & Dalton on brief) for Appellee Rederi A/B Fredrika.

ALBERT V. BRYAN, Circuit Judge:

Unseaworthiness, the basis of his unsuccessful ac-

tion for injuries suffered aboard the MS Dorotea, longshoreman Barnes contends, was erroneously submitted to the jury by the District Judge when he charged that:

> "Under the Maritime Law there is absolute and continuing duty on the part of the defendant, as owners of the vessel, to provide, maintain, and warrant that ship's equipment and gear aboard the vessel are reasonably safe in the area where the plaintiff may reasonably be expected to go.
>
> * * *
>
> "If you believe from the evidence that the *absence of hatch boards* on the number five hatch, or the lighting conditions in and around the immediate area of the number five hold, 'tween deck level, or lack of stanchions around number five hatch, or the clearance between the stacked cargo and hatch square number four hold, 'tween deck level, were in any way in whole or in part unsafe, *then the ship was unseaworthy.* And if you believe that as a proximate result thereof the plaintiff became injured, *at a place where the plaintiff could reasonably be expected to go,* then the defendant is liable to the plaintiff.
>
> "We will now turn to the defense, as asserted by the shipowner. The shipowner owes the longshoreman the duty to provide him with a reasonably safe place in which to discharge his work. But *such duty is confined to those parts of the ship to which longshoremen may reasonably be expected to go.*
>
> * * *

> "To determine whether the shipowner should have reasonably anticipated Barnes would go into number five 'tween deck, you may consider proximity or lack of proximity to the work area, and Barnes' reasons for being there. And if the shipowner could not reasonably have anticipated Barnes would go to the point where he was injured, then warranty of seaworthiness did not extend to Barnes in that area, and you must find for the defendant." (Accent added.)

Barnes' exceptions run to the portions we have emphasized. His claim of negligence was voluntarily relinquished.

Barnes' argument is that the warranty of seaworthiness was not limited in area but extended to and protected him throughout the entire vessel; that the absence of the hatch boards constituted unseaworthiness as a matter of law; and therefore he was entitled to a peremptory charge of the ship's unseaworthiness, the submission of the question to the jury being error. We think not, and affirm the judgment of the District Court upholding the verdict in favor of the shipowner, defendant-appellee Rederi A/B Fredrika.

Employed by a stevedore in the discharge of general cargo from the Dorotea, while docked in Hampton Roads, Virginia, William C. Barnes was working with others at No. 4 hold. Near the end of the day certain bales of wool were discovered to have been unloaded through mistake. Barnes' gang was ordered to reload them upon the 'tween deck, just forward of No. 4 hold.

The hatch of No. 5 hold, immediately aft of No.

4, had been closed at the weather deck. There was no bulkhead or other fixed separation of the two holds at the 'tween level. In lieu, cargo had been piled athwartships between them to a height of 4 or 5 feet, for about 6 feet in thickness. This wall of cargo extended, at each end, to within 2 or 3 feet of the ship's hull. Between the cargo-wall and the coaming around the squares of the holds there was approximtaely 3 feet for passage.

Barnes had not worked in the No. 5 area that day, and the re-stowing required neither access to nor any use of it whatsoever. A few minutes before Barnes' ill-fortune, pier superintendent Riley had gone part way down the 'tween deck ladder, on the fore side of No. 5, while looking for a reportedly missing stowage of canned beef. He found it stacked in the No. 5 'tween deck side of the cargo-wall near the ladder. None of it had been disturbed. The hold was dark and unlighted. It was covered at the 'tween deck with hatch boards, several of which had been set aside at the ladder and an opening into the lower hold thus created. Barnes was then engaged forward of No. 4 on the 'tween deck.

After the search Riley left the area. Very shortly, upon hearing the report of a fall in No. 5, he went to the weather deck where rescuers had opened No. 5 hatch. He could see Barnes lying at the foot of the ladder in the lower part of the hold. Cartons of the canned meat on the 'tween deck had been broken open, with several cans spread about on the deck. The ladder and the point of the missing boards in No. 5 were approximately 40 feet from where Barnes and his companions had been working.

No mistake is perceived in the Court's submission of the issue of unseaworthiness. Confining the duty of maintaining a seaworthy vessel to the reasonable scope of the longshoreman's activity is logical and correct in principle. Fully acknowledged as an obligee of the ship's duty, nevertheless the longshoreman's due should not exceed the need for his protection as measured by his function on the vessel. He is not subject to momentary orders, as is a crewman, to any part of the vessel whatsoever, and his presence at a location unconnected with his task is not to be anticipated.

The legal soundness of this proposition was explicitly recognized in Calderola v. Cunard S.S. Co., 279 F.2d 475, 477 (2 Cir. 1960), cert. den. 364 U.S. 884, where this was said:

> ". . . A shipowner's duty to provide stevedores with a reasonably safe place to work is 'confined to those parts of the ship to which the (stevedore) . . . may reasonably be expected to go . . .'"

This language was borrowed from Lauricella v. United States, 185 F.2d 327 (2 Cir. 1950), which admittedly was a negligence case, but the Second Circuit's adoption of this statement in an unseaworthiness case gives it pertinency here.

Therefore, the pivotal questions presently were, first, whether the absence of the hatch boards created an unseaworthy condition, next, whether it caused his fall and, thirdly, within what space longshoreman Barnes was warranted seaworthiness. In the disputed circumstances, obviously these were factual issues. Mahnich v. Southern S.S. Co., 321 U.S. 96, 98 (1944);

cf. Scott v. Isbrandtsen Co., 327 F.2d 113, 127 (4 Cir. 1964). The jury was left entirely free to decide them, circumscribed only by the evidence it accredited. The verdict went against Barnes on all questions, and certainly the findings were not without support.

The District Judge, overcautiously we think, told the jury it could not consider whether Barnes had been stealing beef. Evidence on this point was admissible and relevant to establish, if only by inference, that Barnes had not gone around the cargo-bulkhead in his work but, instead, piratically. As the evidence was excluded and the error favored Barnes, the ruling does not enter into our decision.

The judgment of the District Court will be

Affirmed.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9939.

WILLIAM C. BARNES, Plaintiff,

Appellant,

vs.

Rederi A/B Fredrika, Defendant and Third-Party Plaintiff, and Atlantic & Gulf Stevedores, Inc., Third-Party Defendant,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.
September 8th, 1965.

/s/ ALBERT V. BRYAN,
United States Circuit Judge.

RULED
Sept. 9, 1965
Maurice S. Dean
Clerk

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IN THE

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October Term, 1965

No. 886

WILLIAM C. BARNES,

Petitioner

vs.

REDERI A/B FREDRIKA, Defendant and Third-Party Plaintiff, and ATLANTIC & GULF STEVEDORES, INC. Third-Party Defendant

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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II. The fourth circuit's decision is in accord with principles established by this court and with the second circuit's decision in *Calderola v Cunard S. S. Co.*, 279 F. 2d. 475 (1960), cert. den. 364 U.S. 884, 81 S. Ct. 172, 5 L. Ed. 2d. 104.

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ATLANTIC & GULF STEVEDORES, INC., Third-Party Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Rederi A/B Fredrika, respectfully opposes the issuance of a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled matter on September 9, 1965.

The Opinions of the Courts Below and the Jurisdictional Requisites are correctly and adequately set forth in the Petition. However, Respondent disagrees with the statement of the Question Presented as expressed in the Petition. The issue considered and resolved against Petitioner by both the District Court and the Court of Appeals is more accurately stated as follows:

QUESTION PRESENTED

Does The Warranty Of Seaworthiness Owed A Longshoreman Extend To Those Parts Of The Ship Which Are Not Connected Or Related To His Work And To Which He May Not Reasonably Be Expeted To Go?

STATEMENT OF THE CASE

The factual evidence on which the trial jury found against Petitioner is concisely and accurately summarized in the Circuit Court's unanimous opinion as follows:

> "Employed by a stevedore in the discharge of general cargo from the DOROTEA, while docked in Hampton Roads, Virginia, William C. Barnes was working with others at No. 4 hold. Near the end of the day certain bales of wool were discovered to have been unloaded through mistake. Barnes' gang was ordered to reload them upon the 'tween deck, just forward of No. 4 hold.
>
> The hatch of No. 5 hold, immediately aft of No. 4, had been closed at the weather deck. There was no bulkhead or other fixed separation of the two holds at

the 'tween level. In lieu, cargo had been piled athwartships between them to a height of 4 or 5 feet ,for about 6 feet in thickness. This wall of cargo extended, at each end, to within 2 or 3 feet of the ship's hull. Between the cargo-wall and the coaming around the squares of the holds, there was approximately 3 feet for passage.

Barnes had not worked in the No. 5 area that day, and the re-stowing required neither access to nor any use of it whatsoever. A few minutes before Barnes' ill-fortune, pier superintendent Riley had gone part way down the 'tween deck ladder, on the fore side of No. 5, while looking for a reportedly missing stowage of canned beef. He found it stacked in the No. 5 'tween deck side of the cargo-wall near the ladder. None of it had been disturbed. The hold was dark and unlighted. It was covered at the 'tween deck with hatch boards, several of which had been set aside at the ladder and an opening into the lower hold thus created. Barnes was then engaged forward of No. 4 on the 'tween deck.

After the search Riley left the area. Very shortly, upon hearing the report of a fall in No. 5, he went to the weather deck where rescuers had opened No. 5 hatch. He could see Barnes lying at the foot of the ladder in the lower part of the hold. Cartons of the canned meat on the 'tween deck had been broken open, with several cans spread about on the deck. The ladder and point of the missing boards in No. 5 were approximately 40 feet from where Barnes and his companions had been working."

The District Court charged the jury that if the conditions in the No. 5 'tween deck were unsafe, then the ship

was unseaworthy and if Barnes was injured as a proximate result thereof *at a place where he could reasonably be expected to go,* then the shipowner would be liable. The Trial Court further charged that the shipowner's duty to furnish the longshoreman a reasonably safe place to work, *is confined to those parts of the ship to which the longshoreman may reasonably be expected to go.*

The jury's verdict was in favor of the shipowner.

REASONS WHY A WRIT SHOULD BE DENIED

I. The Jury's Factual Determinations Were Uncontested In The Court Of Appeals And Should Not Be Ignored Or Reversed By This Court.

By its verdict adverse to Barnes, the jury concluded that the longshoreman was injured in an area ('tween deck, No. 5 hatch) that was not connected or related to his work of discharging and re-stowing cargo in the 'tween deck area forward of the No. 4 hatch. The jury further concluded that the No. 5 'tween deck was an area to which the shipowner could not reasonably have expected the longshoreman to go. These factual conclusions were not contested in the Court of Appeals. Unless this Court is to ignore or to reverse these factual determinations of both lower Courts, the Petition must be denied. Otherwise, the purpose of a claimant's actual activities at the time of his accident and the scope of his employment while he is temporarily performing an isolated part of the ship's work are irrelevant to the proximate cause of his injury.

An appellate court does not substitute its own conclusions for those of the trial jury, (*Tennant v Peoria & P. U. R. R. Co.* 351 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944);

Ferguson v Moore-McCormack Lines, Inc., 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d.. 511 (1957), nor does certiorari issue when it is unnecessary to determine if the jury's function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected. (*Wilkerson v McCarthy et al, Trustees*, 336 U.S. 53, 69 S. Ct . 413, 93 L. Ed. 497 (1949).

The evidence as to (1) the type work Barnes was supposed to be doing (2) the place Barnes was supposed to be working with the other longshoremen, and (3) the place where Barnes was actually injured, was undisputed and the jury's function in drawing inferences therefrom has been respected in both the District Court and the Court of Appeals. Thus, the Petition should be denied.

II. The Fourth Circuit's Decision Is In Accord With Principles Established By This Court And With The Second Circuit's Decision In *Calderola v Cunard S. S. Co.*, 279 F. 2d. 475 (1960), cert. den. 364 U.S. 884, 81 S. Ct. 172, 5 L. Ed. 2d. 104.

The longshoreman's right to the warranty of seaworthiness arises from the fact that he "is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co. v. Sieracki*, (1946) 328 U.S. 85, 66 S. Ct. 872. In establishing this right in *Sieracki*, this Court rejected the argument that the longshoreman falls under the warranty because of his contract of employment. The right of the longshoreman to the warranty, like the right of the seaman, turns rather upon the worker's status of being in the ship's service than on any common law concept of employer-employee relationship. Throughout the majority opinion in *Sieracki* there is a continuing stress on the "service" and "work" performed as giving rise

to the protection. Nowhere does *Sieracki* state or imply that the warranty should extend to a longshoreman who is *not* performing the services for which he was employed and strayed to a point *wholly* and *completely* unrelated to his work area.

In speaking for a unanimous court below, Judge Albert V. Bryan, said:

(350 F. 2d. 865, 866):

> "No mistake is perceived in the Court's submission of the issue of unseaworthiness. *Confining the duty of maintaining a seaworthy vessel to the reasonable scope of the longshoreman's activity is logical and correct in principle. Fully acknowledged as an obligee of the ship's duty, nevertheless the longshoreman's due should not exceed the need for his protection as measured by his function on the vessel.* He is not subject to momentary orders, as is a crewman, to any part of the vessel whatsoever, and his presence at a location unconnected with his task is not to be anticipated."

The Fourth Circuit is in accord with the Second Circuit's decision in *Calderola v Cunard S. S. Co.*, 279 F. 2d. 475 (1960) cert. den. 364 U.S. 884, 81 S. Ct. 172, 5 L. Ed. 2d. 104, wherein the Second Circuit said:

279 F. 2d. 475 at 477:

> "A shipowner's duty to provide stevedores with a reasonably safe place to work is 'confined to those parts of the ship to which the (stevedore) . . . may reasonably be expected to go . . .'"

Therefore, the District Court's jury charge, approved and affirmed by a unanimous Fourth Circuit, is in accord with guiding principles established by this Court and existing precedent established in the Second Circuit.

CONCLUSION

The Question Presented on this application for certiorari has been answered by both the Second Circuit and the Fourth Circuit which are in accord. The grant of a writ herein will require this Court either to ignore the trial jury's determination of fact or to substitute its own conclusions in place thereof. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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